***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-2316

ORIGINAL

*To be argued by*
ARTHUR B. KRAMER

In The

# United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

- against -

ALAN C. SOLOMON,

*Defendant-Appellant.*

## BRIEF OF DEFENDANT-APPELLANT, ALAN C. SOLOMON


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| Defendant-Appellant. | : | |

# BRIEF OF DEFENDANT-APPELLANT ALAN C. SOLOMON

## Preliminary Statement

Alan C. Solomon apeals from a judgment of conviction on one count of a multi-count, multi-defendant indictment charging a conspiracy to violate, and a number of substantive violations of, the record-keeping regulations promulgated by the Securities Exchange Commission (the "SEC") under the Securities Exchange Act of 1934 as set forth in SEC Rule 17a-3(a) [17 C.F.R. 240.17a-3(a)].

Each of the defendants, except Mr. Solomon, pleaded guilty before trial to the conspiracy count and at least one substantive count. Mr. Solomon was found guilty of the substantive violation charged in Count 7 after trial without a jury on a stipulated statement of

facts before the Hon. Robert L. Carter in the United States District Court for the Southern District of New York. Judge Carter placed Mr. Solomon on a supervised probation program for one year and imposed a $5,000 fine. All other counts against Mr. Solomon were dismissed with prejudice after the trial.

## The Nature of the Case

Mr. Solomon was an officer and director of Weis Securities ("Weis"), a now-defunct Wall Street brokerage and investment banking firm and member of the New York Stock Exchange (the "Exchange"). The Exchange had reason to believe in mid-April 1973 that Weis was in financial difficulty and that it had misreported its financial condition in its monthly reports to the Exchange. Through its investigative staff the Exchange commenced an investigation for disciplinary purposes into these suspected misreporting violations.

On May 17, 1973 Mr. Solomon was summoned, as an allied member of the Exchange, to appear at the Exchange inquiry. Under Article XIV of the Exchange Constitution, he was subject to expulsion had he not appeared and testified at the inquiry.

Mr. Solomon's testimony before the Exchange was incriminating (378a-402a).*. The government used the Solomon

* All references are to page numbers in Appellant's Appendix.

testimony and that testimony alone in obtaining Mr. Solomon's indictment on Count 7. The full transcript of that testimony was also offered in evidence at the trial on the Count 7 charge (373a).

## The Proceedings Below

We moved promptly to dismiss the indictment and to suppress use of the Solomon Exchange testimony. In two separate opinions, the District Judge twice denied the motion, once before and once after an evidentiary hearing (23a-28a, 356a-369a). Neither opinion is officially reported.

After Mr. Solomon's trial and conviction the Court denied a motion for reargument of the motion to suppress based on the rationale of this Court's recent opinion in United States, ex rel. Sanney v. Montanye, 500 F.2d 411 (2d Cir. 1974) (370a).

## The Issues Presented

Two questions are presented in this appeal:

1. Whether Mr. Solomon's Fifth Amendment rights were violated by the government's use of his Exchange testimony to indict and convict him when Mr. Solomon could not -- without risk of expulsion from the securities business -- have refused the Exchange's command to testify?
2. Whether the sole remaining count of the indictment must be dismissed because the

grand jury had before it only the Solomon Exchange testimony which Mr. Solomon had been compelled to give in violation of his Fifth Amendment rights?

## The Facts

### Introduction

Weis was placed in receivership at the end of May, 1973 when the SEC brought a civil suit against it in the United States District Court for the Southern District of New York, alleging, in substance, that the firm did not have sufficient capital under the Securities Exchange Act of 1934 and the implementing Rules of the SEC and the New York Stock Exchange to continue to operate as a broker-dealer, and that Weis had been for some time filing false financial reports with the Exchange and the SEC in an effort to conceal these facts and its otherwise precarious financial condition (Def's Ex.P. ¶13, 349a).

The present indictment followed several months later, on July 16, 1974. It names a number of officers and directors of Weis as defendants, including Alan C. Solomon, charging in substance that they knowingly caused these false financial reports to be filed with the Exchange and the SEC. That is the gravamen of the charge against all defendants -- that they misrepresented Weis' actual financial condition

so that the firm could keep operating when it did not have enough capital to be permitted to do so (4a-22a).

Although SEC Rule 17a(3) and its predecessors has been on the books for more than thirty years this was the first time, according to contemporaneous news releases by the prosecutor's office, that the government had brought criminal charges for its violation against officers of a New York Stock Exchange member firm. (New York Times, July 7, 1973, p.1). The government, the SEC and the Exchange have, in the past, proceeded civilly against those responsible for bookkeeping violations where the alleged wrongdoing was far more egregious than any alleged in this case. See cases discussed: Baruch, Wall Street Security Risk (Acropolis Books, Ltd., 1971), pp. 171-249; Brooks, The Go-Go Years (Weybright & Talley, 1973), pp. 345, et seq. The objective of such civil or administrative proceedings has been to suspend offending members from further participation in the securities business.

Mr. Solomon's Background and Testimony Before the Exchange

Alan Solomon had worked in the securities business all of his adult life from the time of his graduation from college in 1960 until Weis was placed in receivership. (Def's Ex. P. ¶2, 3, 344a-345a). He knew no other business,

had no other skills. Mr. Solomon headed up all of the trading activities of Weis. By virtue of the fact that Weis was a member of the Exchange and he an officer of Weis, Solomon held allied membership in the Exchange. The retention of that status was critical to his functioning as a securities trader; his special skills and experience related to the trading of securities which were listed on the New York Stock Exchange and he could not, as a practical matter, engage in such trading -- nor earn a living in the securities business --if the Exchange were ever to suspend him from allied membership (345a-346a).

Mr. Solomon was summoned to give testimony before the Department of Member Firms of the New York Stock Exchange on May 17, 1973. The subject of that inquiry, as Mr. Solomon was advised at the outset, was whether Weis was in compliance with the net capital requirements of the Exchange and whether he knew anything about the filing of false financial reports with the Exchange which misstated Weis' actual capital situation (347a). In other words, the inquiry concerned the very subject matter of the present indictment.

When Mr. Solomon was directed to appear for questioning, both he and his counsel were aware of Article XIV of the New York Stock Exchange Constitution, which provides in pertinent part:

> "Whenever it is adjudged in a proceeding under this Article that a member, allied member or aproved person has been required

> by the Board or any committee, officer or employee of the Exchange authorized thereby... to furnish information to or to appear and testify before or to cause any such employee to appear and testify before the Board or any such committee, officer or employee and has refused or failed to comply with such requirement, such member or allied member may be suspended or expelled and such approved person may have his approval withdrawn." (Emphasis added)

In addition, Solomon was specifically advised by his counsel that, pursuant to this provision, if he refused to testify he could be suspended from the Exchange. As Mr. Solomon recalls, this warning was driven home by the Exchange staff members who interrogated him (348a).

Mr. Solomon was not told that he might refuse to testify if he were concerned about possible self-incrimination (349a).

## The Exchange and SEC Conduct a Joint Investigation of Weis

Testimony at the suppression hearing below made it plain that the Exchange and the SEC were engaged in a joint investigation into the financial condition of Weis, and that both were concerned about possible criminal violations, before Mr. Solomon was interrogated by the Exchange.

As soon as the Exchange became aware in late April 1973 that Weis had capital and bookkeeping problems, it reported that fact to the SEC (40a-41a, Def's Ex.C., 255a).

The Exchange immediately sent a team of staff examiners or accountants to the Weis premises. At one time or another, as the Chief Examiner, Aubrey Womack, testified, some thirty Exchange examiners were engaged in reviewing the Weis financial records (123a). From April 27th on, Mr. William Shields, a supervisory Compliance Coordinator of the Exchange, reported to the SEC in Washington and to the SEC New York regional office virtually on a daily basis (52a-55a, Def. Exhs. D, E, F). He was fulfilling, as he testified, a statutory duty imposed upon the Exchange (41a).

As soon as the Exchange got wind of the bookkeeping irregularities the Department of Enforcement, under Mr. Stuart Nelson, commenced an investigation into the relevant facts (141a-142a). The first witness, Weis' controller Joel Kubie, was interrogated on the record under oath by Dennis Pape, special counsel for the Exchange, on May 10th. Mr. Kubie was examined again on the record on May 11th and May 22nd. Robert Lynn, the assistant controller of Weis under Kubie and acting controller after Mr. Kubie's departure, testified on May 14th; Mr. Solomon testified on May 17th. The purpose of these interrogations was to determine whether there was any basis for the Exchange to bring disciplinary proceedings against Weis officers and employees for violations of the Exchange Act and rules concerning keeping of proper books and records (141a, 67a-69a). Formal charges were indeed filed

against all of the persons later indicted in this case -- Messrs. Levine, Leit, Solomon, Kubie and Lynn -- on June 4, 1973 (142a). The memorandum of charges against Mr. Leit, received in evidence at the suppression hearing, as Defendant's Exhibit L, is identical to the memorandum of charges filed by the Exchange against the other four Weis officials (273a-315a). It prefigures in considerable detail the charges in the indictment in this case.

As early as Friday, May 11, 1973, the SEC was aware of the possibility that criminal charges might be brought against the various defendants in this case. The branch chief in charge of the case at the SEC, Franklin Ormsten, so advised Mr. Shields at the Exchange (Def. Ex. F, 260a). On May 14th, as a result of a meeting held at the office of Mr. William Moran, the SEC Regional Administrator, there were extended discussions of possible criminal proceedings. This is reflected in the contemporaneous memoranda of Mr. Moran and his assistant Nortman in evidence as Defendant's Exhibits N and O (328a-341a). A formal order of investigation was entered by the SEC on May 15th on the basis of the staff memorandum of May 14th (Def. Ex. M, 320a-325a). A subpoena served on the Exchange on May 16th required the Exchange to turn over all material it had developed in the course of its investigation of the affairs of Weis (Def. Ex. G, 261a). Mr. Pape, an ex-SEC attorney himself, lost no time in handing over the transcripts of the Lynn and Kubie

depositions (Def. Ex. J, 270a). He considered that the subpoena he received on May 16th was a continuing one and that it required him to turn over the transcript of the Solomon deposition, scheduled for the following day, which he did in due course as soon as he returned to New York from a short trip away (102a).

When the SEC staff members served the subpoena on Exchange counsel Pape on May 16th, they were already aware of the fact that Solomon would be appearing within the next few days for questioning in the Exchange investigation (199a).

Mr. Moran, the SEC Regional Administrator and Messrs. Shields and Nelson of the Exchange, all testified that the Exchange was under a duty to investigate its own members to determine whether there were violations of Section 17(a) of the Exchange Act of 1934 and the Commission rules promulgated under that section (174a, 41a, 139a). If these self-policing functions were not properly performed, as Mr. Moran testified, the Exchange was subject to suspension and other sanctions (176a).

That the SEC in fact relies upon the Exchange to perform these delegated investigatory duties is apparent from the disparity in the manpower assigned to the task: the Exchange has, according to the testimony, 75 staff

examiners and 20 to 24 staff attorneys engaged in the investigation and enforcement of member firm compliance with the reporting and net capital requirements of the Exchange Act cum New York Stock Exchange rules (120a, 139a-149a); the SEC has only two people in its New York office assigned to this task, the chief of these two being himself a former Exchange investigator, the witness Jeffrey Morrison (214a).

## Statutes Involved

All relevant statutes, SEC Rules, and rules and regulations of the New York Stock Exchange are set forth in the Appendix to this brief at pages 50 to 52.

## ARGUMENT

### POINT I

**MR. SOLOMON'S TESTIMONY BEFORE THE EXCHANGE WAS IMPERMISSIBLY COERCED AND SHOULD HAVE BEEN SUPPRESSED UNDER THE RULE IN GARRITY V. NEW JERSEY SINCE HE FACED LOSS OF THE RIGHTS AND PRIVILEGES OF EXCHANGE MEMBERSHIP --WHICH MEANT LOSS OF LUCRATIVE EMPLOYMENT IN THE SECURITIES BUSINESS -- HAD HE DECLINED TO TESTIFY**

When Alan Solomon was summoned to give testimony, on the record, by investigators on the Exchange staff, he was faced with the Hobson's choice of invoking his Fifth Amendment rights and risking immediate suspension as an allied member of the Exchange -- and the concomitant loss of his right to continue to work and earn a living in the only way he knew -- or of answering the inquisitors' questions and risking self-incrimination.

The Supreme Court has held, in a case which is for all practical purposes indistinguishable from this one, that testimony elicited by investigating authorities, armed with presumptive power to cut-off respondent's right to work

should he refuse to answer, is coerced testimony and cannot be used against the respondent in any subsequent criminal prosecution. Garrity v. New Jersey, 385 U.S. 493 (1967). The rule in Garrity grants "use" immunity to testimony given in the circumstances under which Mr. Solomon testified before the Exchange. Because the government, in derogation of the Garrity rule, made impermissible use of the Solomon Exchange testimony to obtain his indictment and conviction on Count 7, the conviction should be overturned and the indictment dismissed.

In Garrity police officers were interrogated in a special departmental investigation into the fixing of traffic tickets. They were told that they might refuse to answer on the grounds of possible self-incrimination but that to do so would subject them to removal from office. The police officers' testimony, elicited in this manner, was used to obtain convictions in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. The Supreme Court reversed the conviction, holding that:

> "[T]he protection of the individual under the Fourteenth Amendment against coerced statements

> prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office and...it extends to all, whether they are policemen or other members of our body politic." Id. at 500

The Court recognized coercion can take many forms:

> "The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under Chambers v. Florida, 309 U.S. 227 and related cases can be 'mental as well as physical' ....Subtle pressures...may be as telling as coarse and vulgar ones." Id. at 496 (citations omitted)

It went on to hold that the "choice" between loss of a means of livelihood and a waiver of the privilge against self-incrimination was no choice at all.

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." Id. at 497

In short the Court decided in Garrity that the threat of job forfeiture -- whether by statute or otherwise -- as a condition to the exercise of the Fifth Amendment, even when "applied to situations in which an individual...[is]...perfectly capable of rational choice," is one of the "factors

that the government may not constitutionally inject into the decision-making process." Parker v. North Carolina, 397 U.S. 790, 802 (1970) (separate opinion). It thus adopted in Garrity an exclusionary rule that has since been consistently followed in the few cases which have had occasion directly to apply it. See, e.g., Melson v. Sard, 402 F.2d 653 (D.C. Cir. 1968), People v. Jones, 279 N.Y.S. 2d 892, 53 Misc. 2d 838 (Sup. Ct. N.Y.Co. 1967).

As Garrity and the companion case of Spevack v. Klein, 385 U.S. 511 (1967), make crystal clear, it is of no constitutional significance whether the government or other licensing authority may properly discharge or revoke the license of one who invokes his Fifth Amendment privileges. The mere threat that dismissal may follow is sufficient where the threat is perceived as a serious one. See Uniformed Sanitation Men Assoc. Inc. v. Commissioner, 426 F.2d 619, 626 (2d Cir. 1970) (on remand) cert. denied, 406 U.S. 96 (1972) (Friendly, J.) ("...the very act of the attorney general [in Garrity] in telling the witness that he would be subject to removal if he refused to answer was held to have conferred [use] immunity.")

Here it hardly can be doubted that the threat was real. According to the testimony of Mr. William Shields, a responsible Exchange official, suspension under Article XIV of the Exchange Constitution has customarily been automatic in cases where allied members have failed to "cooperate" and give testimony at investigations conducted by the Exchange enforcement department. Alan Solomon would have been suspended if he did not testify in the Weis investigation (67a). Mr. Solomon was aware of the Article XIV sanctions when he testified; it was the goad that compelled the testimony (348a).

A host of post-Garrity decisions assume the application of the Garrity use immunity rule to all manner of members of the "body politic" whose livelihood or status depends upon some governmental or licensing authority before which they are called to give testimony. See, e.g., Lefkowitz v. Turley, 414 U.S. 70 (1973) (licensed architects could not be disciplined for failure to sign a waiver of immunity pursuant to New York statute); Uniformed Sanitation Men Assoc. Inc. v. Commissioner, 426 F.2d 619 (2d Cir. 1970) (on remand),

cert. denied, 406 U.S. 961 (1972) (disciplinary action could be taken against city employees based on narrow job related inquiries precisely because of use immunity conferred by Garrity, even in the absence of statute); Carter v. McGinnis, 351 F.Supp. 787 (W.D.N.Y. 1972) (state could not discipline prisoners for refusing to testify unless prisoners were advised of "use" immunity provided in Garrity); Bowes v. Commission to Investigate Allegations of Police Corruption, 330 F.Supp. 262 (S.D.N.Y. 1971) (injunction against investigation denied but right of the employee to "use" immunity recognized); Grabinger v. Conlisk, 321 F.Supp. 1213 (N.D. Ill. 1970) (injunction denied against review board inquiry of policeman on the ground that evidence would be inadmissable in criminal proceeding; Furutani v. Ewigleben, 297 F.Supp. 1163 (N.D. Cal. 1969) (refusal to enjoin administrative hearing on ground that if college students are forced to incriminate themselves to avoid expulsion and if testimony is offered against them in subsequent criminal proceedings, Garrity may be invoked in opposition to the offer); Matter of Zuckerman, 20 N.Y.2d 430 (1967), cert. denied sub nom. Zuckerman v. Greason, 390 U.S. 925 (1968) (attorney's

disbarment proceeding held valid, but Court recognized that evidence would be excluded in a criminal action); Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973) (government employee could not be discharged for invoking Fifth Amendment even with respect to narrow inquiries unless he is advised that any testimony he gives is subject to the exclusionary rule in Garrity).

Since Garrity no court -- save the Court below in this case -- has permitted use in a criminal action of any testimony elicited from one threatened with substantial economic harm through loss of his employment or license by state or state-sanctioned action. See, Lefkowitz v. Turley, supra, 414 U.S. 70, 82; United States ex. rel. Sanney v. Montanye, supra. The rationale of Garrity, as well as of the cases cited above, is that the government should not be permitted to take advantage for prosecutorial purposes of testimony which has been obtained by others acting in a governmental or quasi-governmental capacity under the whip of threatened loss of employment or other state-sanctioned privilege.

There can be no question that Mr. Solomon's threatened expulsion from allied membership in the

Exchange represented a substantial economic sanction. Thus the rule of Garrity ought to have been applied in this case as well, if the Exchange in interrogating Mr. Solomon was acting in a governmental capacity. We now show that it unquestionably was.

## POINT II

### THE GARRITY RULE APPLIES: THE EXCHANGE WAS PERFORMING A GOVERNMENTAL POLICING FUNCTION -- DELEGATED TO IT UNDER THE SECURITIES EXCHANGE ACT OF 1934 -- IN ITS INTERROGATION OF MR. SOLOMON

There can be no question that had Mr. Solomon's testimony been given before the SEC rather than the Exchange, Garrity and its progeny would compel its suppression. The SEC could not call Mr. Solomon to testify under a threat of summarily suspending him from further participation in the securities business if he failed to answer the questions put to him on the financial condition of Weis Securities and then use the testimony in an ensuing criminal prosecution. Neither, we submit, could the Exchange -- for it was under the network of delegated authority spelled out in the Securities Exchange Act of 1934 and the Rules and Regulations of both the SEC and the Exchange -- merely acting as the alter ego of the Exchange, investigating the very matters which produced the present indictment.

The general principle: constitutional limitations circumscribe actions of private bodies performing state or governmental functions

In a variety of instances agencies and individuals which are not formally within any governmental structure may in fact operate as agents of governmental bodies. It is black letter law that governmental agencies may not circumvent constitutional protections by delegating authority to private individuals. Smith v. Rhay, 419 F.2d 160, 162-63 (9th Cir. 1969). The Fifth Amendment's protection applies against coercion by governmental bodies as well as by those who have a "de facto connection with any public law enforcement agency." U.S. v. Antonelli, 434 F.2d 335, 336 (2nd Cir. 1970). See, e.g., Corngold v. U.S. 367 F.2d 1 (9th Cir. 1966).

The Supreme Court has not fashioned a precise formula for determining when seemingly private activity becomes a matter of state or governmental responsibility. In other contexts, it has held that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed

its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). In Evans v. Newton, 382 U.S. 296, 299 (1966) the Court stated:

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.... [w]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."

Thus, courts have held that where the regulatory commission of a public utility "is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action...." Baldwin v. Morgan, 287 F.2d 750, 755 (5th Cir. 1961). Where the state is actively and pervasively involved in an activity, it cannot claim to have withdrawn because actual supervision is carried out by a private association. Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 228 (5th Cir. 1968). And, where the federal or state governments "become so involved in the conduct of...otherwise private bodies that their activities are also the activities of these governments" there may be

a finding of state action "without the private body necessarily becoming either [the government's] instrumentality or their agent in a strict sense." Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, 966 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

Under any one or more of the rubrics enunciated in these cases it is clear that the Exchange investigation which produced the Solomon testimony was state action. The conduct of that investigation, in the words of Evans v. Newton, supra, was so "entwined with governmental policies [and] so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action" by Garrity. First, the Exchange investigation was one which fell within the specific mandate of the Securities Exchange Act of 1934 and the Rules of the SEC; and second, the facts demonstrated, that within that state-decreed regulatory framework, the Exchange and the SEC were conducting a coordinated joint investigation into the Weis record-keeping fraud.

> In interrogating Mr. Solomon, the Exchange was performing a governmental function expressly delegated to it under the Securities Exchange Act of 1934 and the SEC's implementing rules

The New York Stock Exchange -- the country's preeminent stock exchange -- is, indubitably, "affected

with a public interest." As the House Committee on Interstate and Foreign Commerce declared in its report preceding the enactment of the Securities Exchange Act of 1934:

> "The great exchanges of this country upon which millions of dollars of securities are sold are affected with a public interest in the same degree as any other utility." H.R. Rep. No. 1383, 73rd Congress, 2d Sess. 15 (1934)

The Securities Exchange Act contemplated that these security exchanges should be self-regulating within certain broad guidelines set by the Act. As the Supreme Court stated in Silver v. New York Stock Exchange, 373 U.S. 341 (1963) at 352-53:

> "Thus arose the federally mandated duty of self-policing by exchanges. Instead of giving the Commission the power to curb specific instances of abuse, the Act placed in the exchanges a duty to register with the Commission, § 5, 15 USC § 78e, and decreed that registration could not be granted unless the exchange submitted copies of its rules, § 6(a)(3), 15 USC § 78f(a)(3), and unless such rules were 'just and adequate to insure fair dealing and to protect investors,' § 6(d), 15 USC § 78f(d). The general dimensions of the duty of self-regulation are suggested by § 19(b) of the Act, 15 USC § 78s(b), which gives the Commission power to order changes in exchange rules respecting a number of subjects, which are set forth in the margin." [Footnotes omitted]

In short, the Exchange Act legislation which Mr. Solomon was charged with violating criminally -- in this

case of first criminal impression -- rests upon the proposition that the stock exchange is like a "great utility" and that it has the duty of policing itself.

Scrutiny of the relevant Exchange Act sections, the SEC rules and the Exchange regulations -- specifically those dealing with the net capital and reporting requirements -- shows how completely the government has delegated to the Exchange the policeman's role in the enforcement of those rules which here concern us. If ever there was a delegation of state powers to a nominally non-governmental agency, these statutory provisions and the implementing SEC and Exchange rules embody it. The inevitable corollary for our purposes is that the Exchange, which here played the policeman's role, must do so under the constitutional limitations which Garrity imposes on the policeman himself.

Thus, Section 17(a) of the Exchange Act (15 U.S.C. § 78q(a)) sets the general reporting requirements applicable to members of every national securities exchange which are to be fleshed out by rules to be promulgated by the Commission. Rule 17a-3 (17 C.F.R. § 240.17a-3) describes the records which must be kept by exchange members. Section a(11) of that rule

imposes a requirement of providing the SEC with a monthly computation of aggregate indebtedness and net capital, but sub-section a(11)(ii) and Rule 15c3-1 (17 C.F.R. § 240.15c3-1) provide in effect that if an exchange has more stringent net capital and reporting requirements than does the SEC, then the member firms of that exchange shall comply with those more stringent rules.

New York Stock Exchange Rule 325 does in fact contain more stringent net capital and reporting requirements than those set forth in SEC Rule 15c3-1. Accordingly, Weis, as a member firm of the New York Stock Exchange, was required to make its capital computations and keep its records in accordance with that Exchange Rule; and the Exchange had the primary responsibility for policing Weis' compliance with Rule 325.

In the area of net capital compliance the Exchange is required to -- upon penalty of losing its status as a national securities exchange -- and has in fact long functioned as the SEC's agent-in-fact. Dawidoff, The Power of the Securities and Exchange Commission to Discipline Members, 41 Fordham Law Review,

549, 554-56 (1973);* and see Baird v. Franklin, 141 F.2d 238, 242 (2d Cir. 1944), cert. denied, 323 U.S. 737 (1944).

As Professor Loss has written in his authoritative Securities Regulation treatise, the SEC has as a matter of long standing policy constituted the Exchange as its alter ego in the policing of member firms' compliance with the net capital and reporting rules thus freeing the Commission personnel for direct surveillance of non-Exchange member firms. Loss, Securities Regulation, Vol V, p. 3433 (1969 Supplement).

This policy has been specifically articulated by the SEC in an official pronunciamento in which the Ex-

---

* "[T]he exchange must furnish the Commission with its rules, which constitute a second set of regulatory guidelines alongside those of the Commission itself. These rules include the exchange's constitution, articles of incorporation, by-laws, and other 'instruments corresponding thereto.' The exchange must also agree to furnish the Commission with amendments to these categories of rules. The rules of the exchange must 'include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade * * *' and must 'declare that the willful violation of any provisions of [the Exchange Act] or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.' In addition to setting forth the core of the exchange's disciplinary scheme, these provisions raise the distinct possibility of discipline for conduct proscribed and policed concurrently by the Commission and by the exchange itself." (Emphasis added, footnotes omitted).

change -- and other self-regulating exchanges exempted from the reporting requirements of SEC Rule 15c3-1 -- are enjoined to "conduct such inspections and maintain such other procedures as are necessary to be reasonably sure that members are complying with the capital requirements of the exchange." (emphasis added) Sec. Ex. Act Rel. 6691 (1961)

The investigation of Mr. Solomon was conducted by the Exchange under authority thus expressly delegated to it to fix net capital and reporting requirements for Member firms and to supervise and enforce compliance with those requirements.* It cannot be seriously argued in view of this express delegation of authority that the Exchange was performing other than a governmental function in its interrogation of Mr. Solomon in the Weis Securities matter.

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* Mr. William Moran, the Regional Director of the SEC, underscored the Exchange's responsibility in this area in his testimony at the suppression hearing (174a to 176a):

> Q Is it fair to say that the primary job of keeping track of member firm compliance with the bookkeeping and reporting requirements of the SEC, as set forth in the Section 17(a) of the 1934 Act and the rules and regulations of the Commission, in the first instance devolves upon the New York Stock Exchange Department of Member Firms?
>
> A Yes, sir, that is correct. They are a self-regulatory body.
>
> Q Yes. What does that mean in the context of the Securities [Act]?
>
> A It means that in the framework of the legislation the Exchanges and the NASD, for example, the National

(Footnote continued on following page)

The suppression hearing demonstrated beyond peradventure that the Exchange interrogation of Mr. Solomon, in fact, took place within this state-decreed regulatory framework

The Exchange was in fact engaged in the performance of its delegated enforcement duties when Mr. Solomon was questioned. So testified Mr. Shields, the Exchange official whose duty it was to supervise Weis' compliance with the net capital and reporting requirements of the Exchange (41a).

The inquiry into the affairs of Weis was disciplinary in nature -- having as its object imposition of sanctions for the very violations which later led to the indictment in this

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(Footnote continued from previous page)

Association of Securities and Dealers, have obligations placed upon them by the Congress of self-disciplining and regulating their own members. Both of these organizations as well as the other exchanges throughout the country have employees and others who are supposed to do this work.

Q And to report to the SEC in the event they find any net capital violations or any serious bookkeeping miscalculations?

A That is correct, sir.

Q That is a statutory duty imposed upon them by Congress?

A That is correct.

Q In the event that the New York Stock Exchange failed to police itself properly in this fashion the SEC has the right under the statute to suspend the membership from continuing to function or rather the Exchange from continuing to function?

A I don't remember the precise statutory language but we do have remedial sanctions we can take to correct the situation, correct.

case (142a). The end product of the interrogation of Mr. Solomon, and those of Messrs. Lynn and Kubie which preceded and followed it, was the filing by the Exchange of formal charges, in early June, against all of the Weis principals (143a).

These charges of net capital and misreporting violations under the Exchange rules parallel the charges of like substantive offenses in the indictment.

That the Exchange and the SEC were engaged in a partnership in law enforcement, within the statutory framework -- with the Exchange as usual working the laboring oar -- was demonstrated by the sequence of events preceding indictment. Once the Exchange determined that Weis had capital and bookkeeping problems, it sent a team of examiners to the Weis premises. From April 28th on it provided the SEC, in Washington and New York, with daily reports of its findings (52a-55a). Early in May Messrs. Kubie and Lynn told the Exchange investigators that they had been involved, over a long period of time, in a scheme to falsify Weis' records and the reports of its capital and profitability. The Exchange immediately conveyed this information to the SEC; and the SEC commenced its own coordinate investigation.

Mr. Shields of the Exchange spoke to Franklin Ormsten of the SEC on May 11th and was advised that Ormsten

would be heading up the SEC investigation. Mr. Shield's contemporaneous memorandum records what Mr. Ormsten told him on that date:

> "Mr. Ormsten's main interest was that the SEC be involved in the [Exchange] investigation so as to have a chance to interrogate the same people who we are interrogating and to have an opportunity to review the transcripts of testimony that we take. His main point was that if there will be criminal indictments that they be able to move as quickly as possible." (260a)

On May 15th the SEC obtained an order to conduct a private investigation (Def's Ex. 7, 325a). The SEC investigators were told at the time that the Exchange intended in a few days to call Mr. Solomon to testify in the Exchange inquiry, but had not yet done so (199a). With this knowledge, the SEC investigators thereupon delivered a subpoena to the Exchange calling for the production of all prior testimony and records which the Exchange had obtained in its inquiry, as well as a transcript of the still-to-be-taken Solomon testimony. A week later the SEC had brought its civil injunctive action to force Weis out of business, relying in large part on the evidence gathered for it by the Exchange (205a). Early in June, Special Counsel for the Exchange turned over to the SEC a transcript of the Solomon testimony. A week or two thereafter the matter was referred by the

SEC to the United States Attorney's office for prosecution; and the indictment -- predicated against Solomon upon his Exchange testimony alone -- followed on July 16th.

To summarize: the suppression hearing underscored what the relevant sections of the Securities Exchange Act and SEC rules alone make evident -- that the Exchange was engaged in state action in conducting its inquiry into the Weis record-keeping fraud and in interrogating Mr. Solomon in the course of that inquiry.

## The District Court ignored the key facts which required application of the Garrity rule

In his two opinions -- one before and one after the evidentiary hearing -- denying Mr. Solomon's motion to suppress, the District Judge simply ignored this regulatory scheme, the statutory delegation of governmental authority to the Exchange under which the interrogation of Mr. Solomon had been conducted, and the coercion implicit in the threatened expulsion from Exchange membership. The District Court found instead that because the SEC had not acted in bad faith the government was free to use Mr. Solomon's Exchange testimony, however that testimony was

obtained. Why the absence of any showing of bad faith should have been conclusive against Mr. Solomon was never clearly articulated by the District Court. Nor is any glimmering of why provided by any of the authorities cited by the Court, none of which is apposite.

The Court held that the Solomon testimony should not be suppressed because there was no evidence adduced at the hearing that there was any "collusive" arrangement between the SEC and the Exchange. By this the Court appears to have meant that there was no showing made that the SEC, having already embarked upon a criminal investigation, had specifically requested that the Exchange question Mr. Solomon on matters related to that criminal inquiry. The District Judge thought it particularly significant that at the time Mr. Solomon was questioned by the Exchange no decision had been made by the SEC to refer the matter to the United States Attorney's office for prosecution; and the Court goes on to cite a number of cases, United States v. Kordel, 397 U.S. 1 (1970); Donaldson v. United States, 400 U.S. 517 (1971); and United States v. Churchill, 483 F.2d 268 (1st Cir. 1973), in which courts have held voluntary testimony given in an antecedent civil case on matters which later became the focus of a criminal prosecution. All of these cases, however, were plainly beside the point, for in

none of them was the testimony obtained in the civil case compelled, as was Mr. Solomon's, under the threat of loss of employment. The District Judge, in short, simply ignored the key fact which made this case indistinguishable from Garrity and so avoided the necessity of having to apply the Garrity rule to grant the Solomon motions.

The District Court persisted in ignoring the critical facts in refusing to modify its earlier decision in light of this Court's decision in U.S., ex rel. Sanney v. Montanye, supra. The District Court notwithstanding, the rationale of the majority decision in the Sanney case supports our argument for the application of the Garrity doctrine here; indeed, ours is a stronger case on its facts for the application of the Garrity doctrine than Sanney.

This Court's rationale in the Sanney case mandates reversal

Sanney was indicted and convicted in New York state criminal court proceedings on the basis of incriminating statements which he made while being interviewed at a private company where he sought employment as a driver's assistant. Another company employee, one Bewick, administered a polygraph test to Sanney as part of a normal pre-employment screening process. During this test

Sanney told Bewick that he had been a suspect in a murder case and that he had not told the police the full story. Bewick relayed this information to the police who asked that he conduct a further examination of Sanney. After Sanney had been on the job a day or two Bewick said that he would have to take a second polygraph examination to retain his job. This examination took place three days after the first one. Under Bewick's questioning, Sanney then admitted that he had struck the murder victim with a 2' x 4' piece of wood. Sanney was indicted and later convicted in part on the strength of his admissions on the two tests.

Speaking for himself and Judge Anderson, Circuit Judge Mansfield held that the case did not call for the application of the Garrity principle because the risk of "adverse economic consequences" to Sanney was too slight and insubstantial. The Court reasoned that Sanney had held his job as a driver's assistant for only one or two days at the time of the second interrogation, and the threat of losing that position could not be "labelled a 'substantial economic sanction'". This the Court contrasted with the case where someone stood to lose a position which he had held for many years, seniority status or other substantial privileges if he refused to cooperate and give testimony. That, of course, is Mr. Solomon's case.

In Sanney this Court stated most emphatically that the rule of Garrity applies to compel suppression of a statement obtained from someone whose right to private employment depends upon the giving of the statement if the state is involved even indirectly in the process by which the statement is obtained. Thus, the Court states at 500 F.2d 414:

> "The controlling factor is not the public or private status of the person from whom the information is sought but the fact that the state has involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement. Nor do we perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent for the police, rather than through a person on the public payroll. The state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect." (Emphasis added.)

In Mr. Solomon's case, the state was directly involved in obtaining his testimony since the entire Exchange investigation was a byproduct of the statutory delegation of authority to the Exchange detailed above.

In addition, as the facts emerged at the suppression hearing, the government was shown to have been involved no less indirectly than in Sanney in the actual process by which the Solomon testimony was obtained for prosecutorial use (See discussion supra pp. 30-32).

The fact that the SEC did not itself suggest in the first instance that Solomon be interrogated can hardly be thought to be determinative: no more did the police officers in Sanney in the first instance suggest that the private investigator interrogate Sanney. The lead was developed independently by the private investigator, who told the police of his suspicions concerning Sanney, just as in our case the Exchange developed the initial adverse information about Solomon and passed it on to the SEC.

To state the matter somewhat differently, the finding in Sanney that the private investigator acted as an agent of the police is predicated on the showing of the extent to which the investigator and the police cooperated with one another, not upon any collusive arrangement between the two. In this case the evidence establishes that the SEC and the Exchange were cooperating even more closely in conducting an integrated investigation: the agency-in-fact relationship was conclusively demonstrated by the uncontradicted oral testimony and documentary evidence.

## POINT III

DISMISSAL OF THE INDICTMENT IS REQUIRED BECAUSE THE TAINTED EXCHANGE TESTIMONY WAS THE ONLY EVIDENCE PRESENTED TO THE GRAND JURY TO SUPPORT THE COUNT 7 CHARGE

If the Court concludes, as we contend it should, that Mr. Solomon's testimony before the Exchange was compelled in violation of his Fifth Amendment rights, then Mr. Solomon's conviction on Count 7 must be reversed, since it was obtained through use of that testimony (Stip. of Facts ¶7, 373a).*

A question remains whether this Court should remand for a hearing to enable the government to show that none of the evidence it would offer at a retrial of the Count 7 charge was derived from use of the tainted Exchange testimony or whether this Court should dismiss the Count 7 charge because the tainted Exchange testimony was the only supporting evidence presented to the grand jury. For the reasons which follow, we submit that the Court must conclude that it should reverse and dismiss.

*Although the facts at the trial were stipulated, the stipulation specifically preserved for appeal purposes Mr. Solomon's objection to the government's use of the coerced Exchange testimony, first raised by the pretrial motion to suppress (Stip. of Facts, ¶24, 377a).

Law and logic forcefully combine to dictate a dismissal of the indictment. There was no evidence before the grand jury to support the Count 7 charge, other than Mr. Solomon's Exchange testimony. An indictment founded solely upon this evidence, obtained as it was in violation of Mr. Solomon's Fifth Amendment rights, should not be permitted to stand.

Count 7 of the indictment charges that all five of the named defendants, Mr. Solomon included, caused Weis to record its purchase of a number of Pan American 4-1/2 % bonds maturing in 1987, as a purchase of a different series of Pan Am bonds, "having a substantially lower value". The effect of such misrecording, it is alleged, was to inflate "Weis' unrealized income by approximately $200,000" (14a-15a).

When Mr. Solomon appeared before the Exchange he recited chapter and verse the details of how he came to purchase these Pan American bonds for the firm account and how they came to be misvalued on Weis' books of account (378a-402a). As is conceded, this Exchange testimony was submitted in its entirety to the grand jury. It was the only evidence before the grand jury to support Count 7. Neither Kubie nor Lynn, the two other defendants who testified before the grand jury, nor any other witness, was questioned about or gave testimony about any of the particulars

of the Pan Am bond purchases or the plan under which they were misvalued, as charged in Count 7.

The statement here that there was no evidence except the Solomon testimony before the grand jury on Count 7 is based upon an examination of the grand jury minutes, which the government afforded us shortly before trial. The Assistant United States Attorney in charge of the case undertook to produce "all the evidence" before the grand jury relating to Mr. Solomon and none was produced on the Count 7 charge except Mr. Solomon's statement to the Exchange. This Court will be able to verify the absence of other supporting evidence by examining the original grand jury minutes which have been transmitted to it under seal as part of the record on appeal.

Although no court has ever squarely decided the issue, there is strong dicta by Chief Judge Friendly, in Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973) to support the proposition -- which logic and a simple sense of fairness alike commend -- that there is a constitutional requirement that an indictment be supported by some evidence not illicitly obtained.

The Fifth Amendment's explicit command that

> "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . . "

surely must encompass a requirement that the grand jury's indictment be based upon some evidence other than evidence violative of the Fifth Amendment's coequal commmand that no person "shall be compelled in any criminal case to be a witness against himself". The protection afforded by the Fifth Amendment's guarantee of grand jury indictment would effectively be nullified if an indictment supported only by compelled testimony were unassailable.

This Court in Goldberg v. United States, supra, and others have indicated that an indictment may well be dismissible if there is tainted and untainted evidence before the indicting grand jury and the two are inextricably intertwined. United States v. Laughlin, 223 F. Supp. 623 (D.D.C. 1963), adhered to on reconsideration, 226 F. Supp. 112 (D.D.C. 1964); and cf. Jones v. United States, 342 F.2d 863 (D.C. Cir. 1964).

Ours is obviously an a fortiori case.

Chief Judge Friendly's opinion in the Goldberg case gives eloquent expression to the reason why a grand jury indictment based in large part upon a defendant's own testimony, extracted from him in violation of his Fifth Amendment rights, ought properly to be dismissed: the grand jurors, however well instructed by the court, simply cannot put out of their minds

a defendant's admission of complicity -- cannot separate the tainted evidence from the untainted.

> "We would be greatly troubled by what has happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify. Although the order to compel testimony might be valid, we would have most serious doubt about the validity of such an indictment. Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's answers out of their minds, cf. Bruton v. United States, 391 U.S. 123 * * * (1968), and testimony compelled by the order would thus 'be used against the witness in [a] criminal case,' cf. Kirby v. Illinois, 406 U.S. 682, 688-689 * * * (1972), in defiance not only of 18 U.S.C. § 6002 but of the command of Kastigar that the immunity must be 'coextensive with the scope of the privilege.' 406 U.S. at 449 * * *. But the Government represented to us in open court that the grand jury before which Goldberg has been directed to answer questions will not be asked to indict him."

See also Note, Disclosure of Grand Jury Minutes to Challenge Indictments and Impeach Witnesses in Federal Criminal Cases, 111 U. Pa. L. Rev. 1154, 1161-62, 1967-69 (1963).

Against the logic of Goldberg and the Fifth Amendment mandate, the government will presumably rely upon the broadly worded dicta of United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956); and Lawn v. United States, 355 U.S. 339 (1958). All pronounce the proposition that "an indictment valid on its face is not rendered invalid merely because evidence otherwise inadmissible was presented to the Grand Jury." But all may be readily dis-

tinguished on their facts.*

* The Supreme Court in Calandra was clearly dealing with a different set of facts and issues: "* * * whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure." 38 L.Ed. 2d 561 at 566. The holding in Calandra leaves open the question here presented.

The distinctions between our case and Costello and Lawn are admirably summarized by the D.C. Circuit Court of Appeals in Jones v. United States, 342 F.2d 863, 872 (D.C. Cir. 1964):

> "We see neither reason nor authority for distinguishing between unconstitutional composition of a grand jury, as in Cassel v. Texas, 339 U.S. 282, * * * (1950), and unconstitutional proceedings of a grand jury, as here, although the Supreme Court has used broad language to the effect that 'An indictment returned by a legally constituted unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.' Costello v. United States, 350 U.S. 359, 363, * * * repeated in Lawn v. United States, 355 U.S. 339 * *: *. The context in each of these two cases shows that this broad language applies only when grand jury proceedings have not violated constitutional rights.
>
> * * *
>
> "Costello, therefore, is no bar to our view that an indictment obtained in violation of constitutional rights must be dismissed. On the contrary, Costello substantially supports this view. For the Supreme Court affirmed the conviction of Costello on the ground that the grand jury's action in indicting him had not violated his constitutional rights. The Court thereby implied that if the grand jury's action had violated his constitutional rights, the indictment would have been invalid and the conviction would have been reversed." (Emphasis added).

(Footnote continued on following page)

None deals with the issue here involved: the invalidity of an indictment based solely on evidence obtained in violation of constitutional rights.

Moreover, this Court recently indicated that it does not regard Calandra as precluding a challenge to and dismissal of an indictment based solely upon evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. United States v. James, 493 F.2d 323, 326 (2d Cir. 1974.)** See also Goldberg v. United States, supra, 472 F.2d 513 at 516, fn. 4.

The rationale of Kastigar, McDaniel -- discussed in Point IV of this brief -- and Goldberg has not been impaired by the Supreme Court dictum in Calandra. If the Fifth Amendment's twin guarantees of the right to indictment by a grand jury and the privilege against self-incrimination are to be

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(Footnote continued from previous page)

Lawn was distinguished in Jones on the ground that the defendants had raised only "unsupported suspicions" that the grand jury had been presented with the illegal evidence; "* * * if the unsupported suspicions had been facts, the second indictment would have been invalid * * *." 342 F.2d 863 at 873.

** In the James case the defendant, after trial and conviction, challenged the validity of an indictment returned by a grand jury before which he had been illegally summoned and questioned. The Court found, after reviewing the grand jury minutes, that there was "ample evidence" before the grand jury "to support the the indictment, independent of and apart from anything James said while he was before it." 493 F.2d 323 at 327.

given fair, meaningful and equivalent effect, the indictment in this case must be held invalid and dismissed.

POINT IV

THE CONVICTION SHOULD BE REVERSED BECAUSE THE GOVERNMENT RELIED AT THE "TRIAL" ON THE COUNT 7 CHARGE ONLY ON THE TAINTED EXCHANGE TESTIMONY AND ITS FRUITS; AT A MINIMUM, THE GOVERNMENT SHOULD BE REQUIRED AT A HEARING ON REMAND TO PROVE AFFIRMATIVELY THAT NONE OF THE EVIDENCE IT WOULD OFFER ON A RETRIAL WAS THE FRUIT OF THE TAINTED EXCHANGE TESTIMONY

Mr. Solomon's testimony before the Exchange was not voluntarily given. Fifth Amendment protections bar use of that testimony and of all its fruits, just as if the testimony had been elicited under a specific grant of immunity. As in the use immunity cases, the prosecutor was required not only to eschew the use of the immunized testimony, but to meet the heavy burden of showing affirmatively that he had made no use of it directly or derivatively to provide "investigatory" leads or to focus investigation on the person testifying. See Kastigar v. United States, 406 U.S. 441, 460-61 (1974); Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964); Uniformed Sanitation Men Assoc. Inc. v. Commissioner, supra, 426 F.2d 619, 626; United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L. J. 171 (1972).

Although it had ample opportunity, the government made no effort at the trial, or before, to meet its burden of

demonstrating that the other evidence offered at trial to support the Count 7 charges had been "derived from a legitimate source wholly independent of the compelled testimony." Kastigar v. United States, supra, 406 U.S. 441, 460.

We submit that a dismissal is required because of the Government's failure to meet this burden. At a minimum, however, this Court should reverse and remand for a Kastigar-type hearing, with directions to dismiss the case if the government could not make the affirmative showing required by Kastigar that none of the evidence it proposed to offer at a new trial had been derived from the Exchange testimony. See United States v. McDaniel, supra, at 311; Goldberg v. United States, 472 F.2d 513, 516, fn. 5 (2d Cir. 1973).* United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973), rev'd on other grounds 491 F.2d 473 (2d Cir. 1974).

In United States v. McDaniel, supra, the Eight Circuit Court of Appeals ordered dismissal of a federal indictment obtained after the prosecutor who presented

* Footnote 5, in the Goldberg case, reads as follows: "Without endorsing everything said in Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171, 181-188 (1972), we would think that prosecutors, both in their own interest and in fairness to the defendant, would do well to consider the certification of evidence available prior to the compulsion of testimony, proposed at p. 182. See also The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 187-189 (1972)."

the case to the federal grand jury had read defendant's testimony given to a state grand jury under an immunity grant, even though there was no showing that the federal prosecutor had made any other use of that state grand jury testimony. The Court stated at 482 F.2d 305 at 311:

> "We find, however, that even though the voluminous reports, which we have examined, may have afforded proof of an independent source of the evidence adduced at McDaniel's trial, such reports nevertheless fail to satisfy the government's burden of proving that the United States Attorney, who admittedly read McDaniel's grand jury testimony prior to the indictments, did not use it in some significant way short of introducing tainted evidence. See The Supreme Court, 1971 Term, 86 Harv.L.Rev. 181, 186 (1972); Note, Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli, 82 Yale L.J. 171, 185, 186 (1972). Such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."

In our case, the prosecutor went far beyond a reading of Solomon's Exchange testimony. He relied upon it entirely to obtain an indictment on Count 7; and he made no attempt whatever at the trial to establish an independent source for the other evidence offered against Mr. Solomon.

There is little or no likelihood that the government could meet the burden contemplated by Kastigar and McDaniel at a hearing after remand. The Count 7 charges in the indictment were based solely on the Solomon testimony. If the government had not gathered or presented any independent, untainted evidence to the grand jury by indictment time, it is highly improbable that it could demonstrate affirmatively that it

had thereafter gathered evidence from wholly independent sources -- that it had not used the tainted Exchange testimony in some significant way, either to focus the investigation upon Mr. Solomon or to provide leads to the documents or the other witnesses relating to the Count 7 charge.

In short, the government offered no proof at the trial -- and most probably could not do so after remand -- that its other evidence was unconnected with the tainted Exchange testimony. This would appear to militate against the remand option and to lend pragmatic reinforcement to the law and logic which compel a dismissal now.

## CONCLUSION

Mr. Solomon's Exchange testimony was compelled in violation of his Fifth Amendment rights. He was indicted solely on the basis of that testimony and convicted after a trial in which the evidence must all have been derived from the government's improper use of the compelled testimony.

For the reasons set forth in this brief, Mr.

Solomon's conviction on Count 7 should be reversed and the Count 7 charge in the indictment dismissed.

Respectfully submitted,

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## APPENDIX

### Statutes, Regulations and Rules Involved

SEC. 17(a). SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. §78q(a).

(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books and other records, and make such reports as the Commisssion by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, peprs, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other exminations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

RULE 17a-3(a) 17 C.F.R. §240.17a-3(a).

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current the following books and records relating to his business:

* * *

(11) A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to §240.15c3-1; Provided, however, (i) That such computation need not be made by any member, broker or dealer unconditionally exempt from §240.15c3-1 by subparagraph (b)(1) or (b)(3), thereof; and (ii) that any member of an exchange whose members are exempt from §240.15c3-1 by subparagraph (b)(2) thereof shall make a record of the computation of aggregate indebtedness and net capital as of the trial balance date in accordance with the capital rules of at least one of the exchanges therein listed of which he is a member. Such trial balances and computations shall be prepared currently at least once a month.

* * *

RULE 15c3-1, 17 C.F.R. §240.15c3-1

(a) No broker or dealer shall permit his aggregate indebtedness to all other persons to exceed 2000 per centum of his net capital and every broker or dealer shall have the net capital necessary to comply with the following conditions:

(1) If he becomes registered as a broker or dealer on and after August 13, 1971, his aggregate indebtedness to all other persons on and after August 30, 1972 and for 12 months after becoming registered shall not exceed 800 per centum of his net capital, and except as provided for in subparagraphs (a)(3) and (a)(4) hereof, he shall have and maintain net capital of not less than $25,000;

* * *

(b) Exemptions.

. . . .

(2) The provisions of this rule shall not apply to any member in good standing and subject to the capital rules of the American Stock Exchange, the Boston Stock Exchange, the Midwest Stock Exchange, the New York Stock Exchange, the Pacific Coast Stock Exchange, PBW Stock Exchange, or the Chicago Board Options Exchange, Inc., whose rules, settled practices and applicable regulatory procedures are deemed by the Commission to impose requirements more comprehensive than the requirements of this rule; provided, however, That the exemption as to the members of any exchange may be suspended or withdrawn by the Commission at any time by sending ten (10) days written notice to such exchange, if it appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors so to do. This exemption shall not be available to the members of any exchange whose capital rules do not provide that in the computation of net capital there shall be a deduction of not less than 10% of the contract price of each item in the securities failed to deliver account which is outstanding 40 to 49 calendar days: 20% of the contract price of each item in the securities failed to deliver account which is outstanding 50 to 59 calendar days; and 30% of the contract price of each item in the securities failed to deliver account which is outstanding 60 or more calendar days. This exemption shall not be available to the members of any exchange whose rules do not provide after September 29, 1972 for ratios and net capital at leasst equal to the minimum ratios and net capital required by subparagraphs (a)(1) and (a)(2) hereof.

. . . .

NEW YORK STOCK EXCHANGE RULE 325

(a) No member or member organization doing any business with others than members or member organizations or doing a general business with the public, except a member or member organization subject to supervision by State or Federal banking authorities, shall permit, in the ordinary course of business as a broker his or its Aggregate Indebtedness to exceed 1500 per centum of his or its Net Capital, which Net Capital shall be not less than $100,000 in the case of a member organization which carries any accounts for customers, which services customer accounts from more than one office, which effects principal transactions or which has a corporate affiliate or corporate subsidiary, not less than $50,000 in the case of any other member organization subject to this rule, not less than $50,000 for any member who services customer accounts and employs a registered representative, and not less than $25,000 in the case of any member who services customer accounts, unless a specific temporary exception is made by the Exchange in the case of a particular member or member organization due to unusual circumstances.

The initial Net Capital of a member organization shall be at least twice the Net Capital required to be maintained by this rule.

* * *

NEW YORK STOCK EXCHANGE CONSTITUTION, ARTICLE XIV, SECTION 9.

Whenever it is adjudged in a proceedng under this Article that a member, allied member or aproved person has been required by the Board or any committee, officer or employee of the Exchange authorized thereby to submit his books and papers or the books and papers of his firm or of any employee thereof or the books and papers of the member corporation in which he is a stockholder, or of any employee thereof to the Board or any such committee, officer or employee or to furnish information to or to appear and testify before or to cause any such employee to appear and testify before the Board or any such committee, officer or employee and has refused or failed to comply with such requirement, such member or allied member may be suspended or expelled and such approved person may have his approval withdrawn.

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

US COURT OF APPEALS: SECOND CIRCUIT

USA,

Appellee,

against

SOLOMON,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 14th day of November 1974 at Foley Square, New York City

deponent served the annexed Appellant's Brief upon

Paul J. Curran

the in this action by delivering 3 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this 14th day of November 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975